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11 ERIC BRAVICK

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DFINITY USA RESEARCH, LLC, a limited  
liability company,

Plaintiff,

v.

ERIC BRAVICK, an individual and DOES 1  
through 100, inclusive,

Defendant.

Case No. 5:22-cv-03732-EJD

**REPLY TO PLAINTIFF'S  
OPPOSITION TO DEFENDANT ERIC  
BRAVICK'S REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
MOTION TO DISMISS**

Date: January 26, 2023  
Time: 09:00 a.m.  
Ctrm.: 4, 5<sup>th</sup> Floor  
Judge: The Hon. Edward J. Davila

Complaint filed: May 11, 2022

1       The emails referenced in Plaintiff's complaint are properly subject to judicial notice and  
 2 incorporation by reference. Judicial notice is appropriate when a document has been incorporated  
 3 by reference into a complaint but not attached, so long as neither the authenticity nor relevance of  
 4 the document is contested. *See, e.g., Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir.  
 5 2010); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1240 (N.D. Cal. 2014). A court may also  
 6 take judicial notice of any fact that "can be accurately and readily determined from sources whose  
 7 accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

8       Plaintiff's argument that any document that takes the form of an email is not judicially  
 9 noticeable because it is subject to interpretation is incorrect. Courts regularly take judicial notice  
 10 of email communications. *See, e.g., Perkins*, 53 F. Supp. 3d at 1241 (N.D. Cal. 2014) (taking  
 11 judicial notice of three emails whose authenticity was not disputed); *Fernandes v. TW Telecom  
 Holdings, Inc.*, 2016 WL 704723, at \*3 (E.D. Cal. Feb. 23, 2016) (taking judicial notice of an  
 12 email). Judicial notice is proper when "plaintiff does not dispute the emails' authenticity." *Theta  
 Chi Fraternity, Inc. v. Leland Stanford Junior Univ.*, 212 F. Supp. 3d 816, 822 (N.D. Cal. 2016).  
 13 Plaintiffs have not contested the authenticity of the communications, or that they were the  
 14 communications referenced in Plaintiff's complaint. (*See* Dkt. 19, Pls. Opp. to Bravick's Request  
 15 for Judicial Notice ("Opp. RJN"); Complaint ¶¶ 12-13.) Because Plaintiff challenges neither the  
 16 authenticity nor relevance of these emails, and because there is no question for either, they are  
 17 appropriate for judicial notice.

20       Next, these documents were incorporated by reference. A document is incorporated by  
 21 reference into a complaint "if the plaintiff refers extensively to the document or the document  
 22 forms the basis of the plaintiff's claim." *Steinle v. City & Cnty. of San Francisco*, 919 F.3d 1154,  
 23 1162 (9th Cir. 2019) (quoting *US v. Ritchie*, 342 F.3d 903, 908 (9th. Circ. 2003)). They are  
 24 referred to in the Complaint at ¶¶ 13-14. The reason they are incorporated by reference is not just  
 25 that they are mentioned, but because the Complaint relies on them. *See, e.g., Eidmann v.  
 26 Walgreen Co.*, 522 F. Supp. 3d 634, 641-42 (N.D. Cal. 2021), appeal dismissed, No. 21-15659,  
 27 2021 WL 4785889 (9th Cir. May 17, 2021) (Davila, J.); *Malley v. San Jose Midtown Dev. LLC*,  
 28 2020 WL 5877575, at \*3 (N.D. Cal. Oct. 2, 2020) (Davila, J.). Without these emails, Plaintiff

1 would have provided no basis for any of their claims. That they allegedly informed Mr. Bravick  
 2 of which equipment they wanted him to return is a necessary component of their claims for  
 3 breach of contract (Complaint ¶ 21), conversion (Complaint ¶ 27), civil penalties under  
 4 California Penal Code section 496(c) (Complaint ¶ 34), and restoration of property pursuant to  
 5 Civil Code section 1712 (Complaint ¶ 40). *Nguyen v. Stephens Inst.*, 529 F. Supp. 3d 1047, 1053-  
 6 54 (N.D. Cal. 2021) (incorporating by reference communications from defendant to plaintiff  
 7 related to plaintiff's "underlying claims."). They are also required for several of the proposed  
 8 remedies.

9       Finally, Plaintiff claims that Mr. Bravick "conflates judicial notice with principles of  
 10 incorporation-by-reference." (Opp. R.J.N at 3.) What Plaintiff ignores is that having failed to  
 11 provide the Court with documents incorporated by reference, Mr. Bravick was forced to submit  
 12 these emails through a request for judicial notice. *See Perkins*, 53 F. Supp. 3d at 1240 (N.D. Cal.  
 13 2014) ("The purpose of this rule is to 'prevent plaintiffs from surviving a Rule 12(b)(6) motion by  
 14 deliberately omitting documents upon which their claims are based.'") (quoting *Swartz v. KPMG  
 15 LLP*, 476 F.3d 756, 763 (9th Cir. 2007)). Plaintiff also argues that it did not rely on the emails in  
 16 its Complaint.

17       Aside from being mentioned in the Complaint, Plaintiff relies on the emails in its  
 18 opposition, arguing that these emails point to circumstances that should have put Mr. Bravick on  
 19 notice that the property he allegedly possessed was stolen. (Pls. Opp. to Bravick's Motion to  
 20 Dismiss, at 5.) Plaintiff's own arguments show that the emails seek to establish one of the  
 21 elements of its claim under California Penal Code 496(c). *Id.*

22       For these reasons, Mr. Bravick's request for judicial notice of these documents should be  
 23 granted.

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1 Dated: August 12, 2022

Respectfully submitted,

2 CROWELL & MORING LLP

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4 By: /s/ Joachim B. Steinberg

5 Gabriel M. Ramsey  
Joachim B. Steinberg

6 Attorneys for Defendant  
7 ERIC BRAVICK

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